No. 21,944

IN THE

United States Court of Appeals

For the Ninth Circuit

PVT. FELIX CHAVEZ, JR.,
Appellant,

vs.

MAJOR GENERAL R. G. FERGUSSON, U.S. Army, Commanding General, Fort Ord, California,
Appellee.

BRIEF FOR APPELLANT

FRANCIS HEISLER,
HEISLER & STEWART,
P. O. Drawer 3996,
Carmel, California 93921,
PETER FRANCK,
2890 Telegraph Avenue,
Berkeley, California 94705,
Attorneys for Appellant.

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BRIEF FOR APPELLANT

I

THE PLEADINGS AND FACTS AS TO JURISDICTION

Plaintiff below, and Appellant here, brought this action in the District Court against Defendant, Appellee here.

The complaint for Declaratory Judgment and Injunction alleged that Appellant became a conscientious objector after he became a member of the Armed Forces. When he became a believer in the teachings of the Jehovah's Witnesses, he conscientiously objected to war in any form and he so informed his Commanding Officer. Because of his

religious training and beliefs, he was unable to participate in any military training; in preparation for war; or to salute an officer. Nevertheless, he was given such an order and when he refused, he was court-martialed and sentenced to hard labor for a period of six months, which he spent at the post stockade.

After being released from the stockade for nine days, he was given the same order as before as to training and saluting, which he, for the same reason as before, was unable to comply with and he was court-martialed the second time. He was again found guilty and sentenced to six months at hard labor, spending that period at the post stockade.

In April, Appellant filed with Appellee a request for administrative discharge on prescribed military form DA 1049. He requested the discharge in accordance with UP AR 635-20 as a conscientious objector.

Appellant qualified under above regulation for administrative separation from service. However, the Appellee, for no legal reason nor justification, denied Appellant's application for discharge.

Appellant was also ordered by Appellee to appear before a Clemency Board before which he stated that he cannot, because of his religious training and belief, comply with any order that is to be given to him to prepare for war. Appellant's Commanding Officer informed him that he will attempt to obtain a discharge as unsuitable for military service under AR 212. However, Appellee refused to grant such discharge contrary to the provisions of said regulation.

Thereafter, the Commanding Officer gave Appellant an order which he could not conscientiously carry out and further ordered him to be tried before a general court-martial, charging him with violation of Article 90 of the Uniform Code of Military Justice.

The complaint alleged that Appellee's refusal to obey the orders caused him to be tried twice before a court-martial and is threatened with a third court-martial were orders which were and are illegal, unlawful and beyond the scope of Appellee's authority. It is illegal because the Appellee failed to comply with AR 635-20, which requires Appellant's administrative discharge. It is further illegal because of Title 50 USC Sec 456 (j) under which Appellant qualifies for exemption to military service. Appellant also claimed that Appellee was informed of his inability to participate in preparation for war, nevertheless, caused him to be court-martialed twice and threatened with a third one; thus depriving him of due process of law.

The complaint alleges that Appellee's illegal and unconstitutional acts cause Appellant to suffer irreparable injury which cannot be monetarily compensated for and Appellee threatens him with further unlawful and unconstitutional acts unless restrained by the Court. Appellant claimed that he is entitled to a Declaratory Judgment to the effect that Appellee's past and threatened acts are illegal and void and further that Appellant is entitled to separation from military service in accordance with AR 635-20. The complaint prayed for such relief.

The District Court issued upon the Appellee an order to show cause why he ought not to be restrained from compelling Appellant to be tried before a court-martial for the third time.

The Appellee filed his Return, alleging that the complaint doesn't state a claim upon which relief can be granted and that the Court has no jurisdiction of the subject matter. The Trial Court filed its Memorandum and Order, holding that the relief prayed for is inappropriate and further that the Court is without jurisdiction to grant a Declaratory Judgment. The Order to Show Cause was discharged and the action was dismissed. Appellant thereupon appealed to this Court.

The complaint alleged that the District Court has jurisdiction under 28 USC 1331 and 28 USC 2201-2. It is submitted that this Honorable Court has jurisdiction under 28 USCA Para. 1291.

II

STATEMENT OF THE CASE

Appellant was born in Los Angeles on March 23, 1944, and graduated from high school in 1961, after which he worked in various employments. At the age of 18 he began to work for his father, driving a truck and he did so until he went into active military service at Fort Ord on September 10, 1965. Neither when joining the Reserves nor later when called to active duty was he a conscientious objector. He be-

came such after he studied and adhered to the teachings of the Jehovah's Witnesses; his conscientious objection matured on or about October 19, 1965, while serving at Fort Ord, where the Commanding General was the Appellee. After accepting the teachings of the Jehovah's Witnesses, he could not carry out any order which involved training for preparation of war; he could not salute an officer, and could not in any manner participate in military work. He so informed his Commanding Officer who, nevertheless, ordered him to be court-martialed when he refused to carry out the order to salute. He was sentenced to and suffered imprisonment at the stockade for six months. Upon being released for a short time, and even though he again informed his Commanding Officer that he cannot in any manner participate in military work nor carry out any order, he was given such an order to the same effect, and when he was unable to comply, he was again court-martialed and given a further six months' sentence, which he spent at the post stockade. After being released, he filed form 1049, requesting his discharge in accordance with AR 635-20, which provides for such discharge for conscientious objectors, as Appellant, pursuant to sub-paragraph 3a:

> "Consideration will be given to requests for separation based on conscientious objection to participate in any war, when such objection develops subsequent to entry into military service."

However, Appellee denied his request for separation, and did so without any legal reason and contrary to the above regulation.

Thereafter, Appellant's Commanding Officer, who became convinced of his sincerity and honesty in claiming to be a conscientious objector, attempted to obtain his separation from service in accordance with another Army regulation AR 212, as unsuitable, but Appellee denied such further request.

Appellant, maintaining his conscientious objection to military service on religious grounds, informed his Commanding Officer of his inability to carry out any order pertaining to the preparation for war, nevertheless, was given an order which he could not carry out and was ordered to be tried before a general court-martial.

Appellant claims that he was entitled to separation and the denial of such separation by the Appellee was illegal, unconstitutional and void, and it was in clear defiance of AR 635-20. It was also contrary to the provisions of Title 50 USC 456 (j) pertaining to conscientious objectors.

The Appellant also claims that the second and the threatened third court-martial put him into multiple jeopardy in that he consistently held to his position as a religious objector to military service and preparation for war, and that the orders given to him, even though separated in time, were identical. The orders that brought about his first and second court-martial and the one on which the threatened third court-martial is based were given even though it was known that Appellant would not be able to carry them out because of his conscientious objection, and in conse-

quence, such orders were in violation of Uniform Code of Military Justice because the same was given

> ". . . for the sole purpose of increasing the penalty for an offense which is expected the accused may commit . . ."

The orders which were given and which Appellant was unable to carry out because of his conscientious objection to participation in war in any form constituted entrapment in that if he were to carry out the orders because of the threatened punishment, he would prove himself not to be a conscientious objector, while if he remained truthful to his conscience, then he was to be punished by the courts-martial.

III

SPECIFICATION OF ERRORS

Appellant contends that it was error for the District Court to deny the relief prayed and to dismiss the cause because:

(1) The United States District Court has jurisdiction over the subject matter.

(2) Pursuant to the jurisdiction, declaratory relief should have been granted.

(3) Appellant's right not to be put into multiple jeopardy is of constitutional dimension, the violation of which places the issue within the jurisdiction of the Federal Courts.

(4) Appellant's right not to be compelled to participate in war contrary to his religious training and belief is similarly of constitutional dimension and the jurisdiction of the Federal Court extends over the issues.

(5) The relief prayed for in the complaint should have been granted by the District Court, and this Court ought to order that the issues be tried on the merits.

IV

ARGUMENT

(1) THE UNITED STATES DISTRICT COURT HAS JURISDICTION OVER THE SUBJECT MATTER.

The Trial Court in its Memorandum and Order (TR 30-34) stated that

> "No authority has been advanced by plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier who has made the claim that he is a conscientious objector. In the absence of such authority, this Court can only conclude that the defendant is acting within the scope of his jurisdiction." (TR 32)

Appellant believes that his Memorandum of Points and Authorities (TR 10-14) did, in fact, cite cases which were pertinent to his claim that civil courts are authorized to review military procedures before a court martial to determine whether it acted within its powers. The civil courts have also the right to

eview such process to determine whether or not the ourt-martial gave consideration to the Appellant's ights of due process.

Citing

Palomar v. Taylor, 344 F 2d 937 (CA 10, 1965);
Nelson v. Peckham, 210 F 2d 574 (CA 4, 1949);
Levin v. Gillespie, 121 F Supp 239 (1954); and
Burns v. Wilson, 346 US 137, 97 L Ed 1508, 73 S Ct 1045 (1953).

All these cases stand for the proposition that when he Army acts in excess of its legal authority or lenies or threatens to deny due process, federal courts ave jurisdiction.

Appellant presented sufficient allegations to show hat the issues involved in his case are going far eyond those essentials which are required to main- ain discipline among the military forces.

In *Toth v. Quarles,* 350 US 11, 100 L Ed 8, 76 S Ct (1955), the Supreme Court teaches that

"Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."

The allegations of the complaint, which allegations vere not denied, clearly indicate that the issues pre- ented

". . . arise under the Constitution and laws of the United States."

nd that, therefore, under 28 USC 1331, the federal ourts have jurisdiction.

Appellant submits that the issues presented by the complaint and by the Return of Appellee to Order to Show Cause and the cases cited by him in his Memorandum of Law, indicated that the federal courts have jurisdiction. That such jurisdiction is a necessity to prevent military personnel from being deprived of constitutional rights was recently held by the United States Court of Military Appeals in the case of *United States,* Appellee *v. Michael L. Tempia,* Appellant under 19815, decided on April 25, 1967. The decision in that case answers the inquiry whether the principles enunciated by the Supreme Court of the United States in *Miranda v. Arizona,* 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602 (1966) applied to military interrogations of criminal suspects. The Court of Military Appeals held that they do. Judge Ferguson, who wrote the opinion of the Court, emphasized that

> "The time is long since past—as indeed, the United States recognizes—when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights."

While recognizing

> "That military law exists and has developed separately from other Federal law . . ."

the opinion states that such separate development

> ". . . does not mean that persons subject thereto are denied their constitutional rights. To the contrary, the very issue before the Supreme Court in Burns v. Wilson, supra, was whether such a denial had occurred."

In the *Burns* case, Judge Ferguson held that

> "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."

The *Tempia* case stated that

> "The impact of Burns v. Wilson, supra, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials."

The *Tempia* case refers back to *United States v. Jacoby,* 11 USCMA 428, 29 CMR 244, wherein the Court of Military Appeals said

> ". . . (I)t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces. (Citing Burns v. Wilson, 346 US 137, 73 S Ct 1045, 97 L ed 1508 (1953); Shapiro v. United States, 107 Ct Cl 650, 69 F Supp 205 (1947); United States v. Hiatt, 141 F 2d 664 (CA 3d Cir) (1944).)"

The *Tempia* opinion also reminds us that the Court of Military Appeals in *United States v. Culp,* 14 USCMA 199, 33 CMR 411, Judge Kilday said

> "I agree, thoroughly and completely, with the view that members of the military are not shorn of their constitutional rights while they remain in the military service."

The Chief Judge then noted that

> "It has long been my position that service personnel 'are entitled to the rights and privileges

> secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' "

Judge Ferguson in the *Culp* case stated his opinion to the effect that

> ". . . the Sixth Amendment, insofar as it pertains to the right of counsel, applies in trials by court-martial."

Appellant submits that pursuant to the holding in the *Tempia* case, the command of the Sixth Amendment applies to courts-martial, and that in consequence, the right to the protection of the Fifth Amendment against double jeopardy similarly applies. This is underlined when the opinion in *Tempia* establishes the Court's

> ". . . firm and unshakeable conviction that Tempia, as any other member of the armed services so situated, was entitled to the protection of the Bill of Rights . . ."

The thrust of Appellant's complaint was that he is entitled to declaratory relief to be issued from the United States District Court because the threatened court-martial was to try him the third time for the self-same offense, contrary to the command of the Fifth Amendment of the United States Constitution.

The Trial Court erred when it held that such relief is not available to Appellant, and further erred when it held that the federal courts lack jurisdiction over

the issues presented. The decision was in effect saying that an enlisted man must rely on the court martial for protection in constitutional rights. However, as *Tempia* teaches

"... the military picture ..."

is not as rosy as it is painted

"What does concern us is our duty to follow the interpretation by the Supreme Court of the Constitution of the United States ..."

Judge Kilday, in his concurring opinion, pointed out that

"Article 76, Uniform Code of Military Justice, 10 USC Para 876, notwithstanding, it has long been obvious that court-martial proceedings are open to examination by civil courts ... The scope of such review has, in recent years, been extended to queries regarding an accused's constitutional rights. Burns v. Wilson, 346 US 137, 97 L ed 1508, 73 S Ct 1045 (1953); Gusik v. Schilder, 340 US 128, 95 L ed 146, 71 S Ct 149 (1950). This may involve due process and specific constitutional guarantees. In United States v. Hiatt, 141 F 2d 664, 666 (CA 3d Cir) (1944), that court first pointed out that basic guarantees of fairness afforded by the due process clause of the Fifth Amendment applied to a defendant in a criminal proceeding in a military court. It thereupon concluded, 'it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process

of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody.' "

Judge Kilday cites *Gallagher v. Quinn,* 363 F 2d 301 (CA DC Cir) (1966) wherein the order of the District Court dismissing a complaint for a mandatory injunction was affirmed, nevertheless, that Circuit Court concluded that the District Court had jurisdiction as a matter of due process to review the procedure under the Uniform Code. In that case the Court of Appeals observed

" '. . . though greater latitude respecting due process is allowed military tribunals, due process is requisite. Burns v. Wilson, supra n. 2. And the right to due process would be lost if one deprived of it could not obtain redress because not in confinement.

" 'The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal. The "separate and apart" military law jurisprudence, referred to in those terms in Burns v. Wilson, supra n. 2, at 140, would appear not to be separated so far from possible Supreme Court scrutiny.' "

Judge Kilday in the *Tempia* case reminds us that in *Shapiro v. United States,* 107 Ct Cl 650, 69 F Supp 205 (1947), it was held that the Fifth and Sixth Amendments applied to military tribunals as well as to civil courts. He underlines the basic reason why federal courts have jurisdiction when the issues are of constitutional dimension by citing from *Gallagher v. Quinn* (supra) to the effect

> "... *unless jurisdiction lies in the District Court* in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, *the constitutional validity of the Act of Congress cannot be decided except by the military tribunal.*" (Emphasis supplied.)

That such ought not be and is not the case was stated by the Supreme Court of the United States in *Burns v. Wilson* (supra) wherein the Court held that the issue where a denial of constitutional right occurred is within the jurisdiction of the Court.

The Trial Court erred in denying its own jurisdiction because the issues presented were clearly of constitutional dimension and it was incumbent upon the Trial Court to determine the merits of the case. Its refusal to do so requires reversal.

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(2) PURSUANT TO THE JURISDICTION, DECLARATORY RELIEF SHOULD HAVE BEEN GRANTED.

The complaint clearly delineated the issues to the effect that Appellant became a conscientious objector to participation in war in any form after he joined

the Armed Forces. Regulation AR 635-20 provides for an administrative discharge of those in the posture of the Appellant. It was alleged that his request for administrative discharge pursuant to the above regulation was denied contrary to law, and that therefore, he is entitled to a declaration of his right to such discharge.

The complaint also set forth that Appellant was theretofore twice court-martialed because of his inability to comply with an order to participate in preparation for war. It was also set forth that he is threatened with a third court-martial for the identical same offense—the offense being that having informed his chain in command that because of religious training and belief, he cannot conscientiously participate in serving in the military. But notwithstanding of such information, an order was given to him which to carry out would have violated his conscience, and for conscientious reasons based on religious belief, he could not carry out an order and courts-martial and confinement followed.

The Appellant claimed that the second and the threatened third court-martial put him in multiple jeopardy contrary to the Fifth Amendment of the United States Constitution. It was incumbent then upon the Trial Court to examine into the merits of the case so that the constitutionally declared rights may be protected.

50 USC 456 (j) provides that

> "Nothing contained in this Title shall be construed to require any person to be subject to com-

> batant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

The allegations of the complaint clearly brought Appellant within the purview of the above law and the right thereunder should have been declared by the Trial Court.

The United States Court of Military Appeals in *John L. Gale,* Petitioner *v. United States,* Respondent, Miscellaneous Docket No. 67-2, decided on May 12, 1967, held that that Court has the jurisdiction, even though limited by law, to grant extraordinary remedies in cases involving constitutional rights. There the Court held that

> ". . . in an appropriate case, this Court clearly possesses the power to grant relief to an accused prior to the completion of court-martial proceedings against him. To hold otherwise would mean that, in every instance and despite the appearance of prejudicial and oppressive measures, he would have to pursue the lengthy trial of appellate review—perhaps even serving a long term of confinement—before securing ultimate relief. We cannot believe Congress, in revolutionizing military justice and creating for the first time in the armed services a supreme civilian court in the image of the normal Federal judicial system, intended it not to exercise power to grant relief on an extraordinary basis, when the circumstances so require."

As in the *Gale* case, Appellant submits here that it is not to be believed that Congress intended the Fed-

eral District Court not to exercise power to gran relief when the circumstances so require. The cir cumstances here required the granting of the relie and the refusal to do so requires reversal.

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(3) APPELLANT'S RIGHT NOT TO BE PUT INTO MULTIPL JEOPARDY IS OF CONSTITUTIONAL DIMENSION, TH VIOLATION OF WHICH PLACES THE ISSUE WITHIN TH JURISDICTION OF THE FEDERAL COURTS.

Appellant submits that the Fifth Amendment pro scribes double jeopardy and that such proscriptio binds both the civil and military authorities. While i is true that in *Wade v. Hunter,* 336 US 684, 69 S C 834 (1949), it was held that a reconvening of a court martial which was interrupted in the first instance by the threat of a German invasion, did not put *Wad* into double jeopardy, nevertheless, the Court left n doubt as to the applicability of the Fifth Amendmen prohibition against placing a person twice in jeopardy of life or limb when the offense charged is the same The *Tempia* case, we believe, put to rest any doubt a to the obligation of the military courts to respect con stitutional rights and protect them. The complain clearly stated that Appellant's second court-martia and the threatened third court-martial both were t punish him for the same offense in disregard of th Fifth Amendment to the Constitution. The Suprem Court of the United States repeatedly went on recor to protect an accused who was threatened with mul tiple trials for the same offense. Justice Black, i

dissenting in *Barkus v. Illinois,* 359 US 121, 79 S Ct 376 (1959) pointed out that:

> "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times."

In an ancient case, *Ex Parte Ulrich,* 42 F 587 (1890), it was said that

> ". . . in following the direction of the Supreme Court, we will find no principle of the common law, grounded upon the great rock of the Magna Charta, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense."

The issue is not whether the three orders were given by three different officers, nor is it the question whether the three orders were given separated by six months' time lapse—the issue is whether the orders given to Appellant were of such character that obedience thereto would have been contrary to the conscientious scruples that he had towards participation in war and in preparation therefor. By the latter yardstick, the orders were the same, the refusals were grounded on the same religious belief, and in consequence, the offenses were the same, and being tried for it three times put the Appellant in multiple jeopardy.

In *In re Stubbs,* 122 F 1012 (1905) it was held that Stubbs was not put into double jeopardy because

> ". . . the elements constituting the offense charged (were) radically different . . ."

In the instant case, they were neither radically, o otherwise, different, but, in effect, were identical a they were in *In re Nielsen,* 131 US 176 (1889) wher the Court held that a single offense was involved be cause there was a continuity over the period of whic the second offense was supposed to have taken place In Appellant's case, the elements of the offense wer identical and the offense, or offenses, were extende over a period of his three courts-martial. Therefor according to the teachings of *In re Nielsen,* he has bee subject to triple jeopardy and triple punishment.

The Trial Court should have inquired into the mer its of the allegation as to multiple jeopardy, an failing to do so, it erred to the prejudice of Appellant and therefore, a reversal is required because

> "If there is anything settled in the jurisprudenc of England and America, it is that no man ca be twice lawfully punished for the same offens . . . The common law not only prohibited a secon punishment for the same offense, but it went fur ther, and forbid a second trial for the sam offense, whether the accused had suffered punish ment or not, and whether in the former trial h had been acquitted or convicted." *Ex Part Lange,* 18 Wall. 163 (1874).

4) APPELLANT'S RIGHT NOT TO BE COMPELLED TO PARTICIPATE IN WAR CONTRARY TO HIS RELIGIOUS TRAINING AND BELIEF IS SIMILARLY OF CONSTITUTIONAL DIMENSION AND THE JURISDICTION OF THE FEDERAL COURT EXTENDS OVER THE ISSUES.

50 USC 456 (j) grants a right or at least the grace" to Appellant not to be compelled to particiate in war if such participation is contrary to his eligious training and belief. The allegations of the omplaint clearly put him within the purview of the bove law, which law is bottomed on the recognition y Congress that the First Amendment to the United tates Constitution cannot deprive one of the free xercise of his religion.

But the right or as it is sometimes said, solely a grace" granted to conscientious objectors to be exmpt from military service, in any case, may not eprive Appellant of such right or such "grace" just ecause he is a member of the Armed Forces. This as recognized by the Army when it adopted AR 35-20, and particularly, subparagraph 3a thereof. *Tempia* teaches us that rights (or even grace) of onstitutional dimensions must be respected by miliary courts. The two past courts-martial and the hreatened third one demonstrated that the court-marial failed to abide by the *Tempia* decision, and therore, the Trial Court should have determined the ssues on the merits and having failed to do so, equires a reversal.

(5) THE RELIEF PRAYED FOR IN THE COMPLAINT SHOUL HAVE BEEN GRANTED BY THE DISTRICT COURT, AN THIS COURT OUGHT TO ORDER THAT THE ISSUES B TRIED ON THE MERITS.

The complaint prayed that the Trial Court declar that the threatened third court-martial is illegal b cause the Appellant will be tried the third time fo his inability to participate in military activities, whic inability results from his conscientous objection t war and to preparation therefor based on his religiou training. The complaint also prayed for declaratio by the Trial Court that the Appellant is entitled t separation from military service pursuant to AI 635-20 and the allegations as they were set forth i the prescribed form DA 1049. The Trial Court als asked that the Commanding General of Ford Or Major General R. G. Fergusson, who was the conve ing authority of the courts-martial (and who is no succeeded by Major General Thomas A. Kenan wh became Commanding General of Fort Ord subsequen to the filing of this appeal) be restrained from orde ing Appellant to be tried before a court-martial fo his conscientious inability to participate in militar activities because of his religious training and belief

The allegations of the complaint setting forth th threat to Appellant's constitutional rights presente a clear mandate to the Trial Court to grant the reli prayed for. The relief should have been granted b cause the orders disobeyed by Appellant were n such as were authorized—under the circumstanc prevailing—to be given to him. Article 90 of the Un form Code of Military Justice, subparagraph (b

escribes the offense charged against the Appellant nder the heading, "Disobeying Superior Officer." he discussion thereunder states that

> "The willful disobedience contemplated is such as shows an intentional defiance of authority . . ."

t also states that

> "The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."

n the face of the undenied allegations of the comlaint, the threatened third court-martial involved no ntentional defiance of the authority, but rather a efiance, if defiance it be, brought about by religious ompunction. The order was not such which any offier in the chain of command who was informed—as ney all were—of Appellant's conscientious objection uthorized under those circumstances to be given. In ace of the information given to the chain of comand as to the religious posture of Appellant, it could ot have been expected but that he will refuse to carry ut the order. Therefore, the order was given for the ole purpose of creating an offense which was under ll circumstances to be expected that he must commit.

The Trial Court erred in dismissing the complaint nd refusing to hear the issues on their merits, and herefore a reversal is required.

Reversal is also required because the two

> ". . . court-martial proceedings and the manne in which it was (they were) conducted ran afou of the basic standards of fairness which is in volved in the constitutional concept of due proces of law."

Due process was often defined but probably neve better than when the Supreme Court said, speakin through Justice Frankfurter, that this term is a

> ". . . compendious expression for all those right which the courts must enforce because they ar basic to our free society." *Wolf v. People of Th State of Colorado,* 338 US 25, 69 S Ct 1359.

If the two courts-martial are a yardstick for th third, which Appellant fears it is, then the threatene court-martial will deny him of due process eve though due process ". . . is basic to our free society.

V

CONCLUSION

Appellant submits that because of the constitutional imensions of the rights involved in the instant case, ne Trial Court had jurisdiction of the subject matter nd within its jurisdiction the prayer of the complaint ould have been granted. The refusal to do so reuires a reversal and the Appellant prays that an rder may be entered upon the Trial Court to proceed ith the hearing of the case on its merits.

Dated, Carmel, California,
August 28, 1967.

Respectfully submitted,
FRANCIS HEISLER,
HEISLER & STEWART,
PETER FRANCK,
By FRANCIS HEISLER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation c this brief, I have examined Rules 18, 19 and 39 of te United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief i in full compliance with those rules.

FRANCIS HEISLER,
Attorney for Appellant.